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No. 98496-4

NO. 52450-3-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ALAN JENKS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

REPLY BRIEF

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A. ARGUMENT

1. This Court should reverse due to the trial court's erroneous expert witness instruction, as well as its decision to permit State criminal analyst Thomas Michaud to provide opinion testimony.

a. The State failed to disclose its intent to use an expert witness during discovery pursuant to the requirements of due process.

The parties engaged in lengthy motions in limine before the trial court, and at no time did the State serve notice of its intent to call analyst Thomas Michaud as an expert witness. CP 15-19, 20-23, 24-37, 39-41, 42-48. Our Supreme Court has held that the State's failure to disclose an expert witness under CrR 4.7(a)(2)(ii) can violate a defendant's constitutional right to a fair trial. State v. Blackwell, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993); U.S. Const. amend. XIV; Const. art. I, § 3.

b. The issue is preserved for review by this Court.

The State argues in its brief that Mr. Jenks failed to preserve the error regarding Mr. Michaud for appellate review. Brief of Respondent (Resp. Brief) at 7-8. This is inaccurate.

During pre-trial motion practice, Mr. Jenks moved to exclude police witnesses from testifying as to their opinions as to identification. RP 7-8. Defense counsel argued such opinion testimony would invade the province

of the jury. RP 7-8. The court agreed, excluding police witnesses' opinions that identified Mr. Jenks as the person in the video, or his clothing as that in the video. RP 16. At no time during this discussion, or at any other time, did the State notify the defense or the court that it would attempt to qualify Mr. Michaud – a police analyst – as an expert, or as a witness with special training or experience in order to make an identification of Mr. Jenks.

Yet at trial, the court permitted Michaud to testify that when he entered the search terms dictated by the store clerk's physical description of the robber, Michaud's search returned a result of only one suspect – just the defendant himself. RP 223. "It identified him." *Id.*

Because there was an existing pre-trial order prohibiting exactly this type of improper and unduly prejudicial opinion testimony regarding identification, to which Mr. Jenks had a standing objection, the issue is preserved for appellate review. RP 7-8, RP 16.

The State next contends that Mr. Jenks failed to object to the Michaud testimony. Resp. Brief at 11-13. Although the State is correct that the defense did not object to Michaud's testimony when the testimony was initially presented, it came into the record as lay witness testimony. Mr. Jenks was not on notice that Mr. Michaud would be later erroneously

deemed an expert witness by the trial court, and that his testimony would be objectionable on separate grounds. See CP 59 (defense objects to expert witness instruction).

This Court may review a manifest error affecting a constitutional right under RAP 2.5(a)(3). A constitutional error is manifest where the error caused actual prejudice or practical and identifiable consequences. State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008).

“Important to the determination of whether opinion testimony prejudices the defendant is whether the jury is properly instructed.” State v. Kirkman, 159 Wn.2d 918, 937, 155 P.3d 125 (2007).

As argued in the Opening Brief and below, the court’s erroneous expert witness instruction lent unmerited credibility to Michaud, the criminal analyst, who had testified as a fact witness at trial. Opening Brief at 16-18. Because the court’s error caused actual prejudice and practical and identifiable consequences to the accused, exacerbated by the erroneous jury instruction, the error is manifest and should be reviewed by this Court. RAP 2.5(a)(3).⁵

⁵ The RAP 2.5(a) analysis is only required if the Court is not satisfied that Mr. Jenks’s motion in limine excluding Michaud’s opinion constituted a standing objection, which Mr. Jenks maintains.

c. The court's erroneous expert witness instruction constitutes reversible error.

The State concedes that the trial court instructed the jury that Michaud was an expert witness over Mr. Jenks's timely objection. Resp. Brief at 17; CP 59; RP 314-16, 322-24, 326-27.

The court seemed to share some of the concerns of the defense, indicating that Michaud hardly seemed to be an expert, stating of Michaud: "He's an expert in finding one name..." RP 316-17.

After taking a short recess, including the consultation with "one of my colleagues at Division III," see infra, the court decided to give the expert witness instruction, WPIC 6.51, over Mr. Jenks's objection.

The State argues that the expert instruction should be considered as merely superfluous under the harmless error standard. Resp. Brief at 17-20 (suggesting that an instruction that "states the law correctly but is unsupported by the evidence" may be considered harmless). To support this argument, the State offers case law from jurisdictions such as Colorado, Indiana, New Mexico, Iowa, and Wisconsin, from as far back as the 1970's and even 1939. See Resp. Brief at 18-19.

The State fails to address that Mr. Jenks already identified the manner in which he was prejudiced by the erroneous expert witness

instruction, both below and in the Opening Brief. RP 315-17. Mr. Jenks objected to the instruction, explaining that identification was the critical issue at trial, and Michaud had testified to finding only one name. Id. Mr. Jenks also objected because Michaud was not qualified as an expert and the defense was not on notice. Id.

Further, the State does not address the recent Ninth Circuit cases cited by Mr. Jenks, which discuss the Court's concern about non-expert testimony provided by police witnesses, such as Mr. Michaud. See United States v. Torralba-Mendia, 784 F.3d 652, 658 (9th Cir. 2015) (quoting United States v. Vera, 770 F.3d 1232, 1242 (9th Cir. 2014)). This is why clarification is necessary where such a witness offers both lay and expert witness testimony at trial. Michaud was not qualified as an expert, but the court's erroneous expert witness instruction bestowed on him this "dual role." Vera, 770 F.3d at 1242 (quoting United States v. Freeman, 498 F.3d 893, 904 (9th Cir. 2007)). This error caused confusion to the jury, and encouraged them to give improper deference to the identification made by Michaud. See Vera, 770 F.3d at 1246.

Mr. Jenks has adequately identified the prejudice caused by the court's error, and this Court should reverse.

2. The trial court's exclusion of other suspect evidence is reviewed under the constitutional harmless error standard; as such, reversal should be granted as a violation of due process.

Mr. Jenks proffered evidence that showed another individual may have committed the robbery of the convenience store. RP 39-42 (noting robbery of café next door during same time period). Because there was a sufficient nexus between the two suspects, and because evidence of this alternate suspect tended to create a reasonable doubt, the court's exclusion of the evidence violated Jenks's constitutional right to present a defense.

a. An evidentiary ruling that violates a defendant's constitutional rights is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt.

A trial court's decision to exclude evidence is typically reviewed for abuse of discretion. State v. Franklin, 180 Wn.2d 371, 377 n.2, 325 P.3d 159 (2014). However, an erroneous evidentiary ruling that violates the defendant's constitutional rights is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt. Id. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010) (violations of the right to present a defense are reviewed de novo).

Here, the court's evidentiary ruling excluding other suspect evidence was critical to Mr. Jenks's right to present a defense under the

Sixth Amendment and Article I, sections 3 and 22; therefore, the State must show the error was harmless beyond a reasonable doubt. Jones, 168 Wn.2d at 724; Franklin, 180 Wn.2d at 382. Although the State cites Franklin for its discussion of relevance under ER 401, our Supreme Court reversed in Franklin, holding that an erroneous evidentiary ruling that violates the constitutional rights of a defendant is presumed prejudicial. 180 Wn.2d at 377 n.2.

“The standard for relevance of other suspect evidence is whether there is evidence ‘tending to connect’ someone other than the defendant with the crime.” Franklin, 180 Wn.2d at 381 (quoting State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932)). “[S]ome combination of facts or circumstances must point to a nonspeculative link between the other suspect and the charged crime.” Id.

Courts must focus their inquiry on whether the proffered evidence tends to create a reasonable doubt as to the defendant’s guilt, not whether it establishes the other suspect’s guilt. Franklin, 180 Wn.2d at 381. Id. at 373.

b. Applying the correct constitutional harmless error standard, this Court should reverse, due to the court's violation of Mr. Jenks's right to present a defense.

Because the court's exclusion of other suspect evidence violated Mr. Jenks's right to present a complete defense, the State must show the error was harmless beyond a reasonable doubt. Jones, 168 Wn.2d at 724; Franklin, 180 Wn.2d at 382.

The trial court's findings were erroneous, as well, stating the evidence of another suspect was too speculative and the nexus between the robbery of the convenience store and the café too tenuous. RP 43. The court's analysis, in light of Franklin and State v. Ortuno-Perez,⁶ was incorrect.

The defense did not need to prove that someone other than Mr. Jenks robbed the Zip Trip store, but rather that there was evidence of another person's ability to have committed the crime which tended to create reasonable doubt as to Mr. Jenks's guilt. Franklin, 180 Wn.2d at 381. Mr. Jenks had a good faith basis to cross-examine the officers about the robbery of the café – particularly Detective Barrington, who was also investigating that unsolved crime and would have testified that Jenks was not charged with it. RP 42.

Further, Mr. Jenks should have been permitted to argue in closing that the police were still pursuing another suspect in connection with the café robbery, in response to the State’s argument in closing, “Who else could it have been?” RP 348. Mr. Jenks was prevented from answering that critical question, due to the court’s erroneous ruling on other suspect evidence.

The Supreme Court in Franklin emphasized the proper inquiry is “whether the evidence offered tends to create a reasonable doubt as to the defendant’s guilt, not whether it establishes the guilt of the third party beyond a reasonable doubt.” 180 Wn.2d at 381 (no per se standard). The trial court’s ruling excluding alternate suspect evidence conflicts with this clear rule, where the other evidence established an adequate nexus and was relevant.

c. Reversal is required because the State cannot show the error was harmless beyond a reasonable doubt.

Violation of the right to present a defense is constitutional error. Jones, 168 Wn.2d at 724; Franklin, 180 Wn.2d at 382. Constitutional error is presumed prejudicial, and the State bears the burden of establishing the error was harmless beyond a reasonable doubt. Jones, 168 Wn.2d at 724.

⁶ State v. Ortuno-Perez, 196 Wn. App. 771, 778, 385 P.3d 218 (2016).

Constitutional error is harmless only when the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *Id.* The State cannot meet its burden in this one-witness case, as discussed in the Opening Brief.

This Court should reverse Jenks's conviction and remand for a new trial. *Franklin*, 180 Wn.2d at 383; *Ortuno-Perez*, 196 Wn. App. at 801-02.

3. The trial court erroneously excluded critical ER 608 evidence relevant to the sole eye-witness's credibility.

The court erred when it excluded critical impeachment evidence related to store clerk Jeffrey Davila, the only witness to the robbery. Davila had resigned following disciplinary proceedings as a police officer less than ten years before this robbery; this information was relevant to this witness's honesty and credibility; it was also the only source of impeachment. RP 33-37.

Despite the State's efforts to minimize the impeachment material, the defense was entitled to cross-examine the witness on his prior history as a bad cop.

ER 608 and ER 609 authorize the impeachment of a witness's credibility in certain situations; a trial court's decision is reviewed for an abuse of discretion, but the balance must tip in favor of the defendant in a close case. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

Although the State argues that Mr. Davila had previously worked as a police officer in California and had merely erred in his police paperwork, the court found that Davila had “perhaps” been subjected to departmental discipline. RP 37. Further, the State claims that Davila’s purported misconduct as an officer was more remote in time than it actually was, arguing it occurred “at least 10 years earlier, if not more, before his employment as a store clerk.” Resp. Brief at 28.

This is not an accurate statement of the record, which reflects that Davila worked in law enforcement in Culver City, California between 1996-2006. RP 37. The robbery alleged here occurred in late 2014, just eight years after Davila’s disciplinary proceedings apparently resulted in his ouster from the Culver City Police Department. The State’s attempts to minimize the misconduct of its sole eye-witness should not be condoned.

The court erroneously distinguished the matter from State v. York, 28 Wn. App. 33, 621 P.2d 784 (1980), which also involved paperwork “irregularities.” The court’s ruling was in error, and the error was not harmless. State v. Gresham, 173 Wn.3d 405, 425, 269 P.3d 207 (2012). In this one-witness identification case, Davila’s identification of Mr. Jenks was critical. Because the case turned on the credibility of Davila alone, the error likely affected the outcome. This Court should reverse.

4. The court's comment compromised the appearance of fairness and impartiality.

a. This is a due process issue that may be reviewed by this Court.

In the Opening Brief, Mr. Jenks assigned error based upon the violation of his due process right to a fair trial, which can be raised for the first time on appeal. RAP 2.5(a)(3); State v. Lamar, 180 Wn.2d 576, 586, 327 P.3d 46 (2014). The constitutional due process challenge raised here is distinct from the “appearance of fairness doctrine,” which is related to due process concerns, but is not constitutional in nature. City of Bellevue v. King County Boundary Review Bd., 90 Wn.2d 856, 863, 586 P.2d 470 (1978).

In its briefing, the State seems to argue in the alternative: if the phone call to Division Three occurred, there was no prejudice to the defendant. If there was prejudice to the defendant, the claim has not been preserved for appellate review. Resp. Brief at 40-44. Although the State refers to the judicial conversation as “purported” and “putative,” the record reflects that the phone call did occur, since the trial court discussed the conversation himself. Resp. Brief at 44; RP 322 (“I picked up the phone and called one of my colleagues at Division III, not going to say who it was, I’ll just say it’s a prosecutor. I hope that doesn’t give it away.”).

Next, the State argues that Mr. Jenks “claims he was present” when the trial court stated he spoke to an appellate judge who was a former prosecutor. Resp. Brief at 43. This is hardly an unsupported assertion, since the record clearly reflects Mr. Jenks’s presence during the court’s description of his phone call with Division Three. RP 327. Again, the State’s attempts to minimize and deflect from the actual record are not helpful to this Court’s review.

b. The court’s comments as to his conference with the Court of Appeals violated Mr. Jenks’s right to trial before an impartial judge and infringed upon the right to appeal, requiring reversal.

The Washington Code of Judicial Conduct (CJC) states that judges “must avoid ex parte discussions of a case ... with judges or retired judges who have appellate jurisdiction over the matter.” CJC 2.9, Ex Parte Communications, Comment 5 (amended Sept. 1, 2013).

The trial court’s specific identification of the Division III jurist as a prosecutor added to the appearance of impropriety and apparent bias. RP 322. In seeking advice from a “prosecutor” and then revealing it in the courtroom, the court failed to “weigh the scales of justice equally between contending parties.” Murchison, 349 U.S. at 136. The prejudice is clear:

following the judicial phone call, the court immediately ruled against the defense as to both pending instructional issues. RP 323-25.

The right to an impartial judge is among the “constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.” Chapman v. California, 386 U.S. 18, 23 & n.8, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The court’s appearance of bias, as well as the chilling of Mr. Jenks’s right to appeal in violation of the Code of Judicial Conduct, undermines the fairness and integrity of this trial. This Court should reverse, regardless of the internal transfer of this appeal within the Court of Appeals.

B. CONCLUSION

Mr. Jenks’s conviction should be reversed for all of the above reasons, as well as those discussed in the Opening Brief. In the alternative, Mr. Jenks’s life sentence should be vacated and a standard range sentence entered. The case should be remanded for further proceedings.

DATED this 8th day of October, 2018.

Respectfully submitted,

s/ Jan Trasen

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 52450-3-II
)	
ALAN JENKS,)	
)	
APPELLANT.)	

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